No. 10,243

United States Circuit Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

WESTERN SHORE LUMBER COMPANY
(a corporation),
Appellee.

On Appeal from the District Court of the United States for the Northern District of California

BRIEF FOR APPELLEE

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INTRODUCTORY.

We take no exception to the statements in the Brief for Appellant as to "Opinion Below", "Jurisdiction", "Question Presented" and "Statutes and Regulations Involved"

Following the style of appellant's brief, we shall refer to the appellee herein as "the taxpayer". We shall use the term "the taxable years" to mean the years taxable for

the purpose of the capital stock taxes involved in this case, namely, the four separate years ending each June 30th during the period from July 1, 1932 to June 30, 1936, both inclusive.

As indicated by the Brief for Appellant, there is no procedural or jurisdictional question in this appeal and no dispute as to the amount of taxes involved. The sole question is as to the merits, namely, whether the taxpayer was doing business during the taxable years within the meaning of the capital stock tax law.

The Statement of Facts in the Brief for Appellant is correct as far as it goes, but it is very limited in its portrayal of the important elements of fact. It is a mere re-statement, almost verbatim, of the findings. While the findings (R. 107-117) are entirely sufficient as such, they are hardly adequate to present a full and balanced picture of the taxpayer's activities during the taxable years. To rely wholly on the findings as a statement of facts for the purposes of this appeal leaves unmentioned so many important and descriptive features of the evidence and ignores so completely the relative importance of certain facts that we propose to re-state the important facts, referring also to the supporting details in their appropriate relationship.

THE IMPORTANT FACTS.

1. **The taxpayer was organized for the purpose of conducting an active lumber business, but was frustrated in this purpose and never conducted any active lumber business except for a partial operation which was terminated more than ten years before the taxable years.**

The taxpayer was incorporated in 1905 because it was believed by its incorporators, including Timothy Hopkins, then treasurer of the Southern Pacific Railroad Company, Senator Felton, and others, that the railroad company was going to build a branch line from San Francisco to Santa Cruz which would go through certain timberlands in Southern San Mateo County and Northern Santa Cruz County (R. 107-108; see also testimony of witness Wood, President of the taxpayer, R. 158-159). Thus the taxpayer was incorporated to acquire these timberlands (R. 107-108) and to operate an active lumber business thereon (R. 158, 160; and see Articles of Incorporation, statement of purposes, R. 100). Although the lands were purchased and thereafter constituted the principal asset of the taxpayer (R. 108, 109-110, 145, 160), the railroad line was never constructed (R. 108, 158-159), so that the taxpayer's primary purpose of conducting a lumber business in all its branches (Articles, R. 100) was completely frustrated. As a result the taxpayer never engaged in any active lumber operation with the sole exception that it operated a small shingle mill commencing about 1918-1919, "but the mill was shut down and was never operated after 1921" (R. 108).

Another party operated a small lumber business on the taxpayer's lands at various times, including the taxable

years, under circumstances which will be further explained below, but the taxpayer itself never engaged in the business for which it was primarily incorporated after the year 1921 (R. 108).

2. For many years prior to and including the taxable years the taxpayer's primary function and activity was that of holding its property until it could be sold as a whole.

Having thus been frustrated in its original purpose of engaging actively in the lumber business, the taxpayer's primary function became—at least by the end of 1921, when the shingle mill was shut down—and thereafter remained, that of owning and holding its timberlands, and it thereafter confined its activities to the maintaining and holding of these timberlands until they could be satisfactorily liquidated (R. 108-109; see also R. 135). But even after this change from its original purpose had become clear, it did not engage in any campaign to sell or otherwise liquidate its properties (R. 112). On the contrary, the record shows that its efforts to sell were conditioned by the hope that it would be able to sell its properties as a whole (R. 111-2). Both before and during the taxable years it had negotiations looking toward a sale of the property as a whole—especially negotiations for such a sale to the State of California or County of San Mateo (R. 111-112, 157-158, 186). On several occasions the taxpayer gave options to prospective purchasers, although no such options were given during the taxable years (R. 112). Such options were in the form of options for sale of the properties as a whole (R. 179-180, 186). At all times the taxpayer was unwilling to sell the property piecemeal (R. 112, 134, 137).

In other words, beginning at least as early as 1922 and from then on, the taxpayer was primarily engaged in merely holding and carrying its timberlands pending the sale of such lands as a unit—a sale which was expected at some indefinite time in the future when a satisfactory deal might be available.

3. The taxpayer was not organized as a liquidating company, never acted as a company primarily engaged in liquidation, but, on the contrary, the taxpayer's only liquidation activities—especially during the taxable years—were necessary for and incidental to the holding of its properties.

Examination of the taxpayer's Articles of Incorporation shows that it was not organized for the purpose of liquidating properties which were already owned by its incorporators, but rather "to engage in and carry on in all their branches a general lumber, * * * manufacturing * * * [etc.] business" and to acquire the necessary lands and other properties therefor (R. 100). This purpose is also shown by the finding that the taxpayer was organized to acquire the timberlands because of the proposed construction of the railroad branch (R. 107-108) and the evidence that these properties were acquired after the taxpayer's organization pursuant to such purpose and as a venture in the lumber business (R. 145, 158, 160). There is nothing in the Articles of Incorporation indicating any intention to act as a liquidating company and the word "liquidate" or "liquidation" does not appear in the statement of purposes in those Articles (R. 100-102). The directors of the corporation had never even discussed dissolution (R. 141-142), nor had they ever adopted a resolution directing liquidation (R. 152).

The yearly taxes on the taxpayer's timber lands have been quite substantial (R. 109). There were also minor current expenses. For example, during the taxable years there were such items as the salary of a caretaker to watch for fires and build fire-trails, the secretary's salary and other miscellaneous expenses (R. 111, 140-141, 162-165, 185). Prior to 1932 the taxpayer had practically no income (R. 135). Sales of timber and tanbark up to and including 1910 had raised $36,449.56 (R. 108) and during the years 1911 to 1922 the taxpayer received $25,094.63 from a similar source (R. 108). In 1920 it sold a portion of its acreage to the State of California for park purposes for $38,400 (R. 108). (These amounts are comparatively small in view of the total property values shown on the balance sheets (R. 225) and the total values reflected by option rights (R. 179-180), indicating total values in excess of one million dollars.) These sums, constituting funds on hand, and other moneys obtained by loans from stockholders, were used to pay the taxes and expenses (R. 109). But during the period from 1925 to 1929 moneys to pay the taxes had to be and were raised by assessments levied on the stockholders (R. 109).

As of July 1, 1932, the indebtedness to stockholders was $66,850.75 (R. 109) and on December 31, 1932, six months after the beginning of the first taxable year, loans and assessments by stockholders, as shown by the taxpayer's balance sheet, amounted to $104,350.75 (R. 225).

Commencing in 1929, in order to provide funds to pay taxes and current expenses (R. 109), the taxpayer entered into certain "stumpage contracts" with the Santa Cruz Lumber Company, a corporation with which it had no

affiliation (R. 113-114, 140). These contracts were three in number. The first one, dated April 23, 1929, covered 480 acres (R. 44-45, 113), but all rights under it expired two years from its date (R. 47, 113), so that it was not actually in effect during the taxable years except as the same property was covered by the third agreement described below. The second stumpage agreement was dated March 10, 1930, and covered an additional 1360 acres and, as it was performed by the parties, continued for a term of eight years from its date (R. 114, 196-197; and see R. 224 and R. 114-115). The third stumpage contract was dated January 17, 1936, and was merely a supplemental agreement whereby the 480 acres originally covered by the first contract, dated April 23, 1929, were subjected to the terms of the second contract dated March 10, 1930, with certain changes not important in the present connection (R. 114, 205-208). This contract was evidently made for the reason that all of the timber and tanbark on those 480 acres had not been cut or removed during the original two-year term of the 1929 agreement.

In effect, therefore, the three stumpage contracts merely constituted a single arrangement whereby Santa Cruz Lumber Company was given the right to cut timber and remove tanbark from a total of 1840 acres out of more than 13,000 acres owned by the taxpayer (R. 113-114; see also the agreements in the record at the pages referred to above and compare the total acreage at R. 109). Santa Cruz Lumber Company had the right to cut over these acres during the years 1929 to 1938, inclusive, and was given possession of the land for that purpose, subject, of course, to certain covenants contained in the contracts as

to due diligence and the payment to the taxpayer of the stumpage amounts specified in the contracts, namely, from $2 to $4 per thousand feet of redwood and pine timber and $5 per cord of tanbark (R. 113-114; and see the contracts in the Record, especially R. 46, 193-194 and 207-208). The total of 1840 acres to which these contracts applied constituted an isolated portion of the taxpayer's lands located on a steep hillside entirely separated from its main block of timberlands by other lands—in different ownership—and of such a character that the lumbering operations on such 1840 acres did not affect the value of the main block of timberlands (R. 112, 137-138 and 156-157). Thus in effect these contracts, taken together, constituted a single continuous arrangement made before the first taxable year, although supplemented in the last taxable year (ending June 30, 1936) by the consolidation of the two separate parcels under a single contract. Furthermore, this entire arrangement constituted in substance a sale by the taxpayer made before the first taxable year of certain timber on an isolated part of its lands, pursuant to which sale some of the timber might be, and was, taken off during the taxable years.

The sole purpose of these stumpage contracts, as well as the sales of timber and tanbark and of redwood lands up to 1922, was to enable the taxpayer to carry and hold its main block of timber lands. The District Court expressly found that the purpose of the stumpage arrangement was to provide the taxpayer with funds to pay taxes and current expenses (R. 113). The deforestation of the lands from which the timber was cut under the stumpage contracts rendered these lands almost valueless (R. 112)

and amounted in essence to a liquidation of the property from which the timber was cut (R. 115). But this was an incidental effect of the stumpage contracts. The proceeds of the stumpage arrangement, including both timber and tanbark proceeds, constituted the only gross receipts of the taxpayer during the taxable years except for minor amounts of interest on bank deposits and less than $500 from sales of machinery from the shut-down shingle mill (R. 224; see also 163-164, 176, and 180-181). All these proceeds were used either directly to pay carrying charges such as taxes and current expenses or as a reserve for future carrying charges, or else were applied as partial payments to the stockholders upon loans which had previously been made by them for earlier carrying charges (R. 114-115). In this connection it appears from the record that loans and assessments by stockholders which, as above stated, amounted to $104,350.75 on December 31, 1932, six months after the beginning of the first taxable year, had only been reduced to $88,941.70 on December 31, 1936, six months after the close of the last taxable year (R. 225). Thus the taxpayer did not during the taxable years succeed in paying off much of the previously incurred carrying charges (see also R. 115 where it is found that the reduction in debt during the taxable years was $13,821.89).

Finally, it is important that under the stumpage arrangement with Santa Cruz Lumber Company the active lumbering business—the cutting of timber and manufacturing of lumber—was conducted, *not* by the taxpayer, but by Santa Cruz Lumber Company. "The timber stumpage contracts did not contemplate that the Company [tax-

payer] itself would engage in any operations, and the Company did not in fact do so. The contracts were in substance simply a license to an operating timber company to cut timber from an isolated section of the Company's properties under an agreement to pay for the timber so cut. * * *'' (R. 115; see also R. 148-149). Except for incidental rights, such as rights of inspection, to ascertain that the contracts were properly performed, the arrangement gave to the taxpayer only the right to receive payments in proportion to the timber and tanbark cut by Santa Cruz Lumber Company at the rates above mentioned (R. 44-51, 189-202 and 205-208). The taxpayer maintained a talleyman whom it paid $300 per year to check the count of timber at the mill of Santa Cruz Lumber Company, but this was merely to insure full and correct payments (R. 111, 113-114, 140, 155, 195-196). Thus all that the taxpayer did under these contracts was to receive funds and protect its rights to receive them. (See also R. 114-115.)

4. All other activities of the taxpayer during the taxable years were solely necessary for, or incidental to, the preservation of its corporate existence in good standing and the carrying of its properties.

Except as stated above in this brief, the only activities of the taxpayer during the taxable years consisted of the following:

The employment of a secretary at $25 per month to keep the taxpayer's books and records (R. 111, 141);

The employment of a caretaker at a cost of $1800 per annum to maintain fire trails in its timberlands and to protect its properties against fires (R. 111, 140-141, 185);

The holding of three meetings of its Board of Directors devoted to routine matters, such as election of officers, banking and safe deposit box resolutions, employment of auditors, other minor matters necessary to keep it in good standing and the acknowledgment of its debts to stockholders in order to keep such debts from being barred by the statute of limitations (R. 110; see also the minutes, R. 43, 58-76, 83, 89-95);

The payment of office expenses and purchase of office supplies (R. 110-111).

During this period the taxpayer executed no contracts except the supplemental agreement with Santa Cruz Lumber Company, dated January 17, 1936, which in effect merely consolidated with the properties under the 1930 agreement the 480 acres originally covered by the 1929 agreement (see above, page 7; R. 110); nor did it purchase any property except office supplies, make any investments, sell any properties or carry on business activities for a profit (R. 110).

To summarize: Long before the commencement of the first taxable year, the taxpayer had abandoned all hope or intention of engaging in the lumber business or any other activity for the pursuit of profit or gain and had determined merely to hold its timberlands until they could be sold as a whole. This intention persisted throughout the taxable years, during which some negotiations to effect such a sale were conducted without success. All of the other activities of the taxpayer during the taxable years were solely such as were necessary for or incidental to the preservation of its existence and the carrying of

its principal timberlands. That the taxpayer had fallen into the state of quietude of a corporation merely holding its property and maintaining its existence is further substantiated by examination of its receipts and disbursements and also its balance sheets for the period 1932-1936, which includes the taxable years. (See R. 224-5.)

SUMMARY OF ARGUMENT.

Before and during the taxable years the taxpayer had reduced its activity to the mere owning and holding of its timberlands, the distribution of the avails thereof and the doing only of such acts as were necessary for the maintenance of its corporate status and the preservation of its main block of timberlands. The stumpage contracts involved no operations by the taxpayer, and the receipt of stumpage payments thereunder amounted to no more than receiving certain ordinary fruits of the ownership of standing timber. The stumpage contracts were entered into in aid of the taxpayer's major purpose and activity, namely, the holding of its timberlands and the maintenance of its corporate status, and were purely incidental thereto. The taxpayer was not organized as a liquidating corporation nor was it actively engaged in liquidating and *Magruder v. Washington, Baltimore & Annapolis Realty Corp.*, 316 U.S. 69, is not in point. Under appellant's regulations a corporation engaged principally in holding its properties was not classified as doing business or subject to the capital stock tax. Appellant's contentions in this case are therefore without support in fact or in law.

ARGUMENT.

1. To be carrying on or doing business within the meaning of the capital stock tax law, a corporation must be organized or its existence maintained for the purpose of engaging in activities for the pursuit of profit or gain.

Decisions of the United States Supreme Court have established the basic principles. Naturally, a corporation organized for profit and pursuing the purpose for which it was organized is doing business.

Thus, corporations whose businesses were principally the holding and management of real estate were held to be doing business in

Flint v. Stone Tracy Co. (1911) 220 U.S. 107, 169.

So, corporations organized to unite undivided fractional interests in timber and mineral lands, empowered to explore, develop and otherwise deal therein, and actually engaged in such activities by disposing of parts thereof, selling stumpage, renting parcels, making explorations and employing an agent to supervise and inspect work, were held to be doing business in

Von Baumbach v. Sargent Land Co. (1917) 242 U.S. 503.

A holding company organized to provide financing for its subsidiary and engaged in so doing and in controlling its subsidiary's business and activities, was held to be doing business in

Edwards v. Chile Copper Co. (1926) 270 U.S. 452.

So, also, was a holding company whose activities included buying and owning the securities of its subsidiaries, en-

dorsing the notes of one, and purchasing bonds of a subsidiary for retirement or sinking fund purposes.

> *Phillips v. International Salt Co.* (1927) 274 U.S. 718; reversing *International Salt Co. v. Phillips* (C.C.A. 3rd, 1925) 9 Fed.(2d) 389.

A corporation which was organized by the bondholders' committee of a defunct railroad corporation to acquire and liquidate properties obtained from the railroad corporation through foreclosure, and which was actually engaged in such activities, was held to be doing business in

> *Magruder v. Washington, Baltimore & Annapolis Realty Corp.* (1942) 316 U.S. 69.

On the other hand, if the characteristic function of the corporation and the one it is carrying out is not the pursuit of gain or profit, the corporation is not doing business. Thus, in

> *United States v. Emery, Bird, Thayer Realty Company* (1915) 237 U.S. 28,

the corporation was organized by members of a Dry Goods Company for the purpose of acquiring the Dry Goods Company's lands and letting them to it, the latter having the management of the property, and assuming the responsibilities in respect of it. The corporation was empowered to perform and enforce the lease and to sell the property upon vote of its stockholders. It covenanted to re-build in case the building were destroyed. The only business it had was to keep up its corporate organization and collect and distribute the rental from its lessee. The court held the corporation was not doing business, saying (p. 32):

> "The question is rather what the corporation is doing than what it could do, 228 U.S. 305, 306, but looking even to its powers they are limited very nearly to the necessary incidents of holding a specific tract of land. The possible sale of the whole would be merely the winding up of the corporation. That of a part would signify that the Dry Goods Company did not need it. The claimants' characteristic charter function and the only one that it was carrying on was the bare receipt and distribution to its stockholders of rent from a specified parcel of land. Unless its bare existence as an intermediary was doing business, it is hard to imagine how it could be less engaged."

Even though a corporation is originally organized for profit, if it subsequently discontinues such activities and thereafter merely maintains its corporate existence and organization, holds its property and receives and distributes the avails thereof, it is not then carrying on or doing business within the meaning of the act, whether or not it also limits its corporate powers. In

> *Zonne v. Minneapolis Syndicate* (1911) 220 U.S. 187,

the corporation was originally organized for the purpose of letting stores and offices in a building owned by it. After carrying on that business, it later leased all its property for a term of 130 years, amending its articles of incorporation to limit its purposes solely to holding the title subject to the lease, and to receiving and distributing to its stockholders the rentals accruing therefrom and the proceeds accruing from any distribution of

the land. It was held not doing business. The court said (p. 191):

> "It had wholly parted with control and management of the property; its sole authority was to hold the title subject to the lease for 130 years, to receive and distribute the rentals which might accrue under the terms of the lease, or the proceeds of any sale of land if it should be sold. The corporation had practically gone out of business in connection with the property and had disqualified itself by the terms of reorganization from any activity in respect to it."

McCoach v. Minehill Ry. Co. (1913) 228 U.S. 295, dealt with a corporation which for many years had operated a railroad. Subsequently it leased its entire properties and franchises to the Reading Company, pursuant to legislative authority, for a long term at a yearly rental and thereafter merely maintained its corporate existence and organization, received annually the fixed rental, interest on bank deposits and interest on dividends and on a "contingent fund" maintained by it, paid office expenses, kept stock books, and its stock was bought and sold on the market. It did not, however, exercise the power of eminent domain or any other special corporate powers. Holding the company not to be doing business, the court said (pp. 303-304):

> "From the facts as stated above it is entirely clear that the Minehill Company was not, during the years of 1909 and 1910, engaged at all in the business of maintaining or operating a railroad, which was the prime object of its incorporation. This business, by the lease of 1896, it had turned over to the Reading

> Company. * * * And it is the Reading Company, and not the Minehill Company, that is 'doing business' as a railroad company upon the lines covered by the lease and is taxable because of it."

Such a quiescent corporation is not doing business merely because it applies the property it holds in such a manner as to produce an income which it distributes to its stockholders.

In *McCoach v. Minehill Ry. Co.,* above, the court gave consideration to the fact that the Minehill Company had a considerable amount of personal assets, known as its "contingent fund", in the form of investments from which it derived an annual income of about $24,000; that it kept a bank deposit, received and collected interest upon such deposit and distributed the income thus received, as well as the rentals, after payment of expenses and taxes, to its stockholders as dividends. The court declared, as to this (p. 306):

> "In our opinion the mere receipt of income from the property leased (the property being used in business by the lessee and not by the lessor) and the receipt of interest and dividends from invested funds, bank balances, and the like, and the distribution thereof among the stockholders of the Minehill Company, amount to no more than receiving the ordinary fruits that arise from the ownership of property."

2. In determining whether or not a corporation is doing business, its actual activities must be considered in relation to the purpose for which it was organized or is being maintained; the bare activities alone are not necessarily determinative.

The foregoing cases provide the principal guideposts to the question of what constitutes doing business within the meaning of the capital stock tax law. However, no formula as to what constitutes doing business has been deduced to fit all situations, as this Court pointed out in

> *United States v. Hercules Mining Co.* (C.C.A. 9th, 1941) 119 Fed.(2d) 288 (291),

and no such formula will be attempted here. There is, nevertheless, one feature of all the foregoing cases which is especially significant for present purposes. That is the emphasis given by the court to the purpose for which the corporation was organized in its relation to the corporation's actual activities. The solution of each case seemed to turn on that point. Using language taken from some of these opinions, the critical question in each case may be stated as follows:

> Was the corporation "organized for the purpose of doing business and actually engaged in such activities . . ."? (*Flint v. Stone Tracy Co.,* 220 U.S. at page 171.)
>
> Was the corporation "engaged in the business . . . which was the prime object of its incorporation"? (*McCoach v. Minehill Ry. Co.,* 228 U. S. at pages 303-304.)
>
> Was the corporation "carrying on" its "characteristic charter function"? (*United States v. Emery, Bird, Thayer Realty Co.,* 237 U.S. at page 32.)

Was the corporation "maintaining its organization for the purpose of continued efforts in the pursuit of profit and gain and such activities as are essential to those purposes"? (*Von Baumbach v. Sargent Land Co.*, 242 U.S. at page 516.)

Was the corporation "organized for profit and . . doing what it principally was organized to do in order to realize profit"? (*Edwards v. Chile Copper Co.*, 270 U.S. at page 455.)

Was the corporation "actively engaged in fulfilling the purpose of its creation"? (*Magruder v. Washington, Baltimore, Annapolis Realty Corp.*, 316 U.S. at page 73.)

It is thus very evident that whether or not the corporation's actual activities are those for which it was primarily incorporated is of vital importance in determining whether or not it is carrying on or doing business.

Appellant's position, however, is that "differences in the purposes for organization of the corporations are not controlling where the activities are of a business nature" (Br. p. 13). Appellant's argument is predicated squarely upon this proposition. The effect of appellant's entire argument is this: That the taxpayer's activities here have been reduced to acts of liquidating; that it is immaterial whether or not such was the purpose of organizing the corporation, and that since a corporation organized for the purpose of liquidating and actually fulfilling that purpose was held to be doing business in *Magruder v. Washington, Baltimore & Annapolis Realty Co.*, above, this case is controlled by that decision.

We cannot agree with appellant that the taxpayer's activities may fairly be described as reduced to efforts looking toward liquidation, as we will show below. Even apart from that, however, the significance of the purpose of incorporation is a fundamental point of difference between us and one which can best be clarified by answer to appellant's argument now.

3. The taxpayer's major purpose and activity during the taxable years was holding its property, and it may not fairly be said to have "reduced its activities to efforts looking toward liquidating . . .", as appellant states.

Appellant states, on page 13 of its brief, "This taxpayer's activities were directed toward liquidating its properties as satisfactory offers were obtained * * *"; and, on page 16, that the taxpayer "had reduced its activities to efforts looking toward liquidating all of the corporation's properties when satisfactory offers were obtained * * *". Similar statements are found elsewhere on page 16 and on page 17 of the brief.

We do not believe such statements are quite justified either by the record or by the findings. It is true that the taxpayer has long intended to make a sale of its properties as a whole, if and when a satisfactory price is obtainable, but the same thing is true of many mere holding companies. It is also correct that in years past options to sell as a whole have been made, but never exercised, that efforts have been made for many years to negotiate a sale of the property as a whole to the County of San Mateo or the State of California, and that the taxpayer has been and is holding its property and maintaining its

organization until such a sale can be effected. But taxpayer has never been willing to liquidate piecemeal or by a campaign of sales, and it gives the facts a false emphasis to say, as appellant does, that its activities were "reduced to efforts looking toward liquidating".

The major activities of the taxpayer consisted of preserving its properties and maintaining its organization, paying taxes and expenses and raising money for that purpose. Even the stumpage contracts, which rendered almost valueless the small portion of the taxpayer's holdings affected and thus resulted in a practical liquidation to that small extent, were not primarily for liquidation. They were entered into to provide funds for taxes and expenses and were thus essentially incidental to holding the property. Appellant's characterization of the activities suggests that the taxpayer's chief concern was carrying on an active liquidation campaign, seeking buyers at large, and selling or attempting to sell a piece here and a parcel there whenever it could get its price. Nothing of the sort occurred. Rather, it is fair to say, as we have already stated, that the taxpayer's activities were reduced to such acts as were necessary to hold and carry its property and maintain its existence until it might succeed in its efforts to liquidate by a single sale of the property as a whole.

Appellant's purpose in so over-emphasizing liquidation is to bring the case as far as possible within the holding of the court in the *Washington Realty Corp.* case, upon which appellant strongly relies. The cases, however, are not comparable.

4. The instant case is not controlled by Magruder v. Washington, Baltimore, and Annapolis Realty Corp.

Appellant admits, even after erroneously characterizing the activities of the taxpayer as solely "acts of liquidation" (Br. p. 17), that the present case is "not on all fours" with that case (Br. p. 16). It is not; and the distinction, which is both obvious and significant, is threefold:

First, the taxpayer there was organized by a bondholders' committee of a defunct corporation *for the purpose of liquidating properties acquired from such corporation through foreclosure.* The taxpayer here was not organized as a liquidating corporation but to carry on an active lumber business on lands which it expected to have served by a proposed railroad branch which would render such active business profitable in the opinion of taxpayer's incorporators.

Second, the taxpayer in the Supreme Court case was actually engaged in the business which was the prime object of its incorporation. The taxpayer here was not carrying out the purpose of its incorporation, but its activities were limited to those necessary and incidental to the holding of its property until its liquidation could be accomplished, and to negotiations for the sale of the property as a whole to accomplish such liquidation.

Third, as already pointed out, in contrast to the taxpayer there, the taxpayer here was not in any proper sense of the word actually engaged in liquidating. Its *liquidation* activities were minor and were

solely incidental to its function of *holding* its properties.

The cases therefore are widely different.

Appellant finds no indication in the *Washington Realty Corp.* case that activities looking toward liquidation, when carried on by a corporation organized for the purpose of liquidation, should be distinguished from similar activities of a corporation organized for another purpose (Br. 16). We think that distinction is plainly indicated in the *Washington Realty Corp.* case and in other decisions both of the Supreme Court and of the lower courts.

In the *Washington Realty Corp.* case, after stating that the corporation had not reached the state of quietude illustrated by the *Zonne* case, the court said in the most decisive sentence in its terse opinion (316 U.S. at p. 73):

> "On the contrary, respondent was actually engaged in fulfilling the purpose of its creation, the liquidation of its holdings for the best obtainable price."

This sentence is especially meaningful in the light of the lower court decisions in the same case. The District Court had declared (*Washington, Baltimore & Annapolis Realty Corp. v. Magruder*, 35 Fed. Sup. 340, at page 342):

> "I reach the conclusion from the evidence in this case that all the activities of this company were solely related to the liquidation of these assets, and that for this reason its stock is exempt from the taxes in question. In short, while neither the Supreme Court nor the Circuit Court of Appeals for this Circuit has yet been called upon to determine

> whether a *purely liquidating corporation* of this precise character is exempt from the provisions of the acts in question, I believe the necessary inference from such decisions as do exist, interpreting the clause 'carrying on or doing business', or synonymous terminology, require an affirmative answer to this question." (Emphasis supplied.)

The Circuit Court of Appeals had said (*Magruder v. Washington, Baltimore & Annapolis Realty Corp.* (C.C.A. 4th), 120 Fed.(2d) 441, at page 443):

> "It is contended on behalf of the defendant that while a corporation originally organized to do business for profit engaged in liquidating its own assets might not be liable for the tax, yet the plaintiff, *organized solely for the purpose of liquidating another corporation,* is liable. We are of the opinion that this contention is not a valid one." (Emphasis supplied.)

Clearly, then, the Supreme Court's statement that, "On the contrary, respondent was actually engaged in fulfilling the purpose of its creation", was in direct answer to the position taken by the lower courts.

The converse situation, where liquidation was not the primary object, was dealt with by the Supreme Court in *United States v. Emery, Bird, Thayer Realty Co.,* above. There, it will be recalled, the corporation held not to be doing business was organized to hold title to property leased to the Dry Goods Company and to distribute the proceeds, with power also to enforce the lease and sell the property. The court observed that the powers of the corporation were very nearly limited to the necessary in-

cidents of holding a specific tract of land, the corporation's "characteristic charter function." It then added (237 U.S. at page 32):

> "The possible sale of the whole would be merely the winding up of the corporation. That of a part would signify that the dry goods company did not need it."

The court could not more clearly have stated that mere liquidation of itself does not constitute doing business.

Lower court decisions are to the same effect. In

Lane Timber Co. v. Hynson (C.C.A. 5th, 1925) 4 Fed.(2d) 666,

a corporation was organized for the general purposes of dealing in real estate, stumpage, logs, timber and building materials (purposes, by the way, which are not the same as engaging in the lumber business, the principal purpose of the present taxpayer). It had long held a single piece of property and had employed agents to sell it, which the agents continuously made efforts to do without success. Beyond that, the corporation had merely held the land and paid taxes. The court held that owning land is not doing business, nor is paying taxes, and that neither had the efforts of the corporation's agents to sell the land rendered it liable. As the court appropriately observed (4 Fed.(2d) at page 666):

> "Most owners of land, whether corporations or individuals, would be willing to sell at a profit."

In

Johnson's Estate v. U. S. (Ct. Cl., 1940) 37 F.S. 617,

the corporation was organized to deal in real estate for

profit and did so for 25 years, at the end of which time it declared, by resolution of its directors, that its activities would thenceforth be confined to the liquidation of its assets and the preservation of its property. The court held the liquidation activities did not render it subject to the tax. It said (p. 623):

> "As a matter of course it endeavored in closing out this property to make a profit and the condition of the real estate market at the time rendered the process of liquidation rather slow, *but this court has held that the fact that a profit is sought in the liquidating process is not sufficient to make the corporation subject to the tax.*" (Emphasis supplied.)

The court distinguished *Edwards v. Chile Copper Co.*, above, on the ground that that corporation was doing what it was primarily organized to do, saying (p. 624):

> "In the instant case, an examination of the purpose clause in the certificate of plaintiff's incorporation (as set out in Finding 5) shows a long list of activities nearly all of which had been abandoned. In fact only the holding, owning, and selling of real estate remained and the principal purpose was not profit but to liquidate the estate."

The court aptly observed (p. 623):

> "If the property had been left in the hands of the executor [the original assets of the corporation having been received from the estate of a decedent] and he had proceeded to do the same things which were done by the corporation in the liquidating process, no one would contend that the executor was carrying on a business."

It is very evident therefore that whether or not a corporation whose activities consist of liquidating its properties has been organized for that purpose is of vital importance on the question whether such liquidation activities constitute carrying on or doing business within the meaning of the capital stock tax law. The fact that the taxpayer in the *Washington Realty Corp.* case was organized as a liquidating corporation was essential to the result reached by the Court, and that case is therefore to be distinguished from this one where the taxpayer is not a liquidating corporation.

Thus the authority upon which appellant relies in this case fails to support its position. Appellant's argument fails for the further reason that it is not well founded in fact. The activities of the taxpayer here cannot properly be characterized as "acts of liquidation". They were directed to holding its timberlands, receiving the avails thereof and maintaining its corporate existence, and whatever aspects of liquidation any of its activities may have had were entirely incidental to that purpose and due to the nature of the taxpayer's property as a wasting asset.

5. The taxpayer's activities under the stumpage contracts amounted to no more than receiving certain ordinary fruits of the ownership of standing timber on a minor and isolated part of the taxpayer's properties.

Were it not for the stumpage contracts there would be no question that during the taxable years the taxpayer was merely owning its property and maintaining its corporate existence and was not carrying on or doing business. Capital stock taxes paid by the taxpayer in the years 1923 to 1926, inclusive, were refunded to the tax-

payer on the ground it was not then engaged in doing business; and the District Court expressly found that the receipt of income under the stumpage contracts constituted the only difference between the activities of the company during the taxable years and its activities during the period from 1922 to 1926 when the company was not engaged in business (R. 112-113). Although the entire activities of the taxpayer must be considered as a whole in determining whether or not it is doing business, still, under the present facts, the effect of the stumpage contracts must be the decisive factor.

Now, it is clear that the mere negotiating and execution of the stumpage contracts—only one supplemental agreement was actually executed during any of the taxable years—did not of itself constitute doing business. The three stumpage contracts were in effect but a single arrangement for the cutting of timber by the Santa Cruz Lumber Company on a small portion of the holdings, and they were the only transactions of the kind ever entered into by the taxpayer. Even they were a mere expedient in aid of the taxpayer's major purpose and activity, the holding of its lands. This single continuing arrangement therefore did not put the taxpayer in the business of dealing in timber lands or stumpage, and we do not understand appellant to make any claim to the contrary. The mere execution of the stumpage agreements no more constituted the doing of business within the meaning of the capital stock tax law than did the execution of the leases by the taxpayers in *United States v. Emery, Bird, Thayer Realty Co.*, and *Zonne v. Minneapolis Syndicate.*

After the stumpage contracts had been executed they involved no further activity whatever on the part of the taxpayer except receiving the payments under the contracts from the Santa Cruz Lumber Company and paying part of the wages of the tallyman. The taxpayer did not cut or remove the timber; that was done entirely by Santa Cruz Lumber Company, which had the entire management and conduct of and responsibility for the operations.

The receipt of the payments had no different effect from the receipt of rental payments under the leases in the *Emery, Bird, Thayer Realty Co., Zonne,* and *Minehill Ry. cases.* It represented merely the receipt of the avails of the taxpayer's property. The only difference between this case and those, in this respect, is in the use to which the properties were put under the contracts with the taxpayers.

The reservation by the taxpayer of the right of inspection and the contribution to the wages of the tallyman pursuant to the stumpage contracts, both were for the purpose of enabling the taxpayer to enforce performance of the agreements according to their terms and did not alter the status of the taxpayer. In the *Emery, Bird, Thayer Realty Company* case the taxpayer's chartered powers included the power to enforce the lease of its property, and in the *Minehill Railway* case the taxpayer maintained its corporate powers and held itself ready to exercise its franchise of eminent domain or other powers if and when required by the lessee. In neither case did these reserved powers render the taxpayer liable for the tax. It has been held, further, that the actual exercise

of such powers pursuant to the terms of such a lease does not result in the corporation doing business.

New York Central & H. R.R. Co. v. Gill (C.C.A. 1st, 1915) 219 Fed. 184;

Traction Companies v. Collector (C.C.A. 6th, 1915) 223 Fed. 984.

The present case, indeed, would seem to be a clearer case in favor of the taxpayer than either the *Zonne,* the *Emery, Bird, Thayer Realty Co.,* or the *Minehill Ry.* cases, for several reasons. First, in those cases, as well as in many others following them, the taxpayer's *entire* properties were devoted to income producing purposes, whereas in the present case the stumpage contracts involved only 1860 acres out of 13,000 acres of timberlands owned by the taxpayer. Eighty-five percent of the taxpayer's holdings were being held idle and put to no use by anyone.

Second, in each of those cases and many another case following them, the mere holding of the taxpayer's property was profitable to the taxpayer in the sense that it produced an income which was distributed to the stockholders in the form of dividends. In the present case no such income was derived from the stumpage contracts, the entire proceeds of which were devoted to the payment of expenses incident to the holding of the land and payment of the taxpayer's indebtedness, despite which a substantial deficit still exists.

Third, and more significant still, there is nothing in the instant case comparable to the income received by the taxpayer in the *Minehill Ry.* case from its investment of

assets in its "contingent fund" which, like the income from the lease, the court said amounted to no more than the ordinary fruits of ownership. For a similar case in this respect, see

Northern Pa. R. Co. v. Rothensies (D.C. E.D. Pa., 1942) 45 F.S. 486.

Here there was no such activity on the part of the taxpayer as the investment and re-investment of the avails of its property, but only three isolated contracts, constituting in essence but a single arrangement, entered into substantially before the taxable years, and no further activity except receiving the payments and paying the tallyman.

No significance is to be attached to the fact that, because of the nature of timberlands as a wasting asset, the carrying out of the stumpage contracts resulted in a virtual liquidation of the small portion of the lands affected thereby. The properties leased by the taxpayers in the *Zonne, Emery, Bird, Thayer Realty Co.* and *Minehill Railway* cases were also subject to depreciation, and the difference is only one of degree. Mining property is similarly a wasting asset, and in

United Mercury Mines Co v. Viley (D.C. D. Ida., S.D., 1937) 20 F.S. 734,

a corporation which had reduced its activities to holding title to mining claims subject to a mining lease and option, payments on which were to be applied to the purchase price, and to receiving and distributing the avails, was held not doing business.

The Supreme Court cases to which we have referred so frequently, of course, are not factually identical to the instant case. The differences, however, are differences in detail and not in substance and the principles applied in those cases are equally applicable here. Although we prefer to base our position, as we have, upon the principles rather than to place our reliance upon mere factual similarities, there is no dearth of cases offering such factual similarities. Among such may be mentioned the following:

Lane Lumber Co. v. Hynson (C.C.A. 5th, 1925) 4 Fed.(2d) 666;

United States v. Hotchkiss Redwood Company (C.C.A. 9th, 1928) 25 Fed.(2d) 958;

Clallam Lumber Co. v. United States (D.C. W.D. Mich. S. D., 1924) 34 Fed.(2d) 944, (1929) 34 Fed. (2d) 947, (1940) 37 F.S. 542 (three cases with the same title involving different years).

The *Clallam Lumber Company* cases, it may be remarked, are not as strong in favor of exemption from the tax as the present case because, although the express purposes stated in the articles were similar to those of the present taxpayer, it appeared that the prime reason for incorporating was to unify various individual holdings so as to make it possible to sell the lands to greater advantage. Yet, notwithstanding that fact, the corporation three times was held not liable for the tax.

6. The taxpayer has reduced its activities to the mere owning and holding of specific property and the distribution of the avails and the doing only of such acts as may be necessary for the maintenance of its corporate status; under the Regulations the taxpayer was not doing business.

We think it must be clear from the foregoing discussion that the activities of the taxpayer bear no resemblance to those described in Article 43(a) of Treasury Regulations 64 (1936 ed.) set forth on page 4 of appellant's brief. It has not been "buying, selling, manufacturing, developing, financing, speculating or otherwise dealing in property" within subdivision (1) of that Article. It has not been "furnishing services of any character" under subdivision (2). It has not been "leasing or managing properties, collecting rents or royalties" according to subdivision (3). Certainly it has not engaged in "the ordinary liquidation of property by negotiating sales from time to time as opportunity and judgment dictate and distributing the proceeds as liquidation is effected" within the meaning of subdivision (5); and, of course, it was subdivision (5) on which the Supreme Court's decision in *Magruder v. Washington, Baltimore etc. Realty Corp.* was solely based. Moreover, the taxpayer has not engaged in any other activity for the purpose of a livelihood, profit or gain, or in any other way "coming within the ordinary and natural signification of 'carrying on or doing business' ", within subdivision (6).

On the contrary, the activities of the taxpayer are aptly described by Exception 2 under paragraph (b) of Article 43 of those Regulations, namely:

> "(2) the distribution of the avails of property and the doing only of such acts as may be necessary for the maintenance of its corporate status in the case in which the organization either was organized for, or reduced its activities to, the mere owning or holding of specific property."

There may perhaps be some overlapping as between this "holding company" provision in Article 43(b)(2) and the "liquidating company" provision in Article 43(a)(5); or, to put it another way, there may be some doubtful ground between the two provisions so that in some cases it may be difficult to draw the line which separates them. Sometimes a corporation may be concurrently engaged in both holding and liquidating. The Supreme Court recognized this in the *Washington Realty Corp.* case, for it considered both provisions in its opinion and finally held that the "liquidating company" provision fitted the facts of that case so perfectly that it was controlling, regardless of whether the "holding company" provision was partially applicable. There, however, liquidation constituted the primary and fundamental purpose of the corporation; liquidating activities were its major activities, covering all of its properties, and the holding of the properties was merely incidental to liquidation.

Our case is the converse. The original primary and fundamental purpose of the taxpayer was to do an active lumber business, but by reason of an event beyond its control—the failure of the railroad to construct a branch line—this purpose of taxpayer was changed to the holding of its properties for an indefinite time until a sale of them as a whole could be advantageously made. During

the taxable years no such sale was imminent and the fundamental and primary purpose was to remain a holding company. The principal activities during the taxable years were the holding and preservation of the taxpayer's properties and the maintenance of its corporate status in good standing. The taxpayer did engage in minor liquidating activities, but these affected only a small and isolated part of its properties and were solely for the purpose of enabling it to continue to hold its main block of timber and maintain its corporate status.

Therefore, in considering which provision of the Articles applies—as between the "liquidating company" provision and the "holding company" provision—it is clear that in our case the facts rendering the "holding company" provision applicable strongly outweigh the facts which would bring the "liquidating company" provision into effect.

CONCLUSION.

In conclusion it is submitted that for the reasons summarized in the last preceding portion of this brief, the decision between the two possibly applicable provisions of the regulations, namely, the "liquidating company" provision and the "holding company" provision, should be made on the basis of the facts showing the primary purpose and principal activities of the taxpayer, just as such decision was made by the Supreme Court in the *Washington Realty Corp.* case. Here the primary purpose and the principal activities during the taxable years classified the taxpayer as a holding company within

Article 43(b)(2), which provides that such a holding company is not doing business within the meaning of the capital stock tax laws. Such classification also accords with the ordinary common-sense understanding of the term "doing business" and with the general principles laid down by the Federal court decisions.

It is submitted that the District Court's conclusions are supported by the facts found and that the judgment is consistent with the facts and in accordance with law. It should be affirmed.

Dated, December 14, 1942.

Respectfully submitted,

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IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

SAN FERNANDO MISSION LAND COMPANY, a corporation, *Petitioner,* vs. COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	No. 10,272 Apr. 27, 1943

Upon Petition to Review a Decision of the United States Board of Tax Appeals.

Before: DENMAN, MATHEWS and STEPHENS, Circuit Judges.

STEPHENS, Circuit Judge.

The petitioner asks us upon review to reverse the decision of the Board of Tax Appeals (now United States Tax Court) to the effect that there was a deficiency in excess profits tax liability of petitioner for the taxable year of 1938 in the sum of $8,035.64. There is no factual issue present, and this petition must be granted if petitioner was not "carrying on or doing business" during any part of the capital stock tax year ending June 30, 1938, within the meaning of § 601(a) of the Revenue Act of 1938. "For each year ending June 30, beginning with the year ending June 30, 1938, there is hereby imposed upon every domestic corporation with respect to carrying on or doing business for any part of such year an excise tax of $1 for each $1,000 of the adjusted declared value of its capital stock."

The following, mainly taken from respondent's brief, is a fair recitation of the facts:

> Taxpayer is a California corporation with principal office at Los Angeles, California, and filed its 1938 income tax return with the Collector there. It was organized in 1904 to buy, develop, and sell land; it acquired over 16,000 acres

about fifteen miles from the center of Los Angeles, and engaged actively and successfully in the development and sale of this tract. In 1918 it declared a dividend of $1,000,000 which it paid by a distribution of lands among its shareholders. Thereafter it donated some land to the city for parks, restricted its business activity, reduced its capitalization from $1,000,000 to $100,000, and distributed $1,250,000 in a series of dividends, the last being one of $100,000 paid on January 29, 1923. Few assets remained, and shareholders displayed little interest in the corporation, but it was not dissolved. After a meeting on February 2, 1927, the directors did not again meet for nearly a decade. On state franchise tax returns, taxpayer was described as "practically liquidated."

Taxpayer's remaining properties after 1930 consisted of a thirty-five acre grove of orange and lemon trees, 138 acres of unplotted hill lands, reservations of mineral rights in some 3,000 acres of land previously sold, and a very small amount of cash. The grove was in poor condition, unprofitably operated for many years, and in 1937 the trees were uprooted and it was abandoned to the state for unpaid taxes. The hill lands lying some twenty miles from the center of Los Angeles were without improvements or available water. Of the original acreage, they constituted a part for which no buyer was found. (As described by petitioner in his opening brief, these unsold lands were "tail-end" pieces.) The grove and these lands were carried on taxpayer's books at $52,500 and $13,800, respectively. The reservations of mineral rights were carried at one dollar. In selling its real estate, taxpayer had in some cases reserved mineral rights and as in early years had authorized its officers to execute oil and gas leases. The board of directors in 1925 gave consideration to proposals for oil leases, and at the meeting on February 2, 1927, they considered several proposals and ratified a release of the reserved rights in certain land for a consideration of $2,940. At the same time they resolved to make no more such releases "for the present, at least."

After 1930, taxpayer operated the grove at a continual loss; in 1932 it made one sale of realty for about $1,500; in 1935 it rented pasture for $75, and in 1936 it received $7,500

for release of oil reservations and for a lot. Taxes and expenses exceeded income except in 1936, and the balance sheet constantly showed a deficit of about $40,000 during the period. In 1936 no oil had been found on or near taxpayer's properties and no survey for oil had been made. At the instigation of the president of one of taxpayer's creditors, the directors met on September 14, 1936, and elected him president. He entered into negotiations for the leasing of oil rights. A lease, authorized by the directors and placed in escrow on November 10, 1937, was not delivered because of the lessee's failure to perform conditions. On his initiative, the grove was abandoned in the fall of 1937.

During the fiscal year July 1, 1937-June 30, 1938, taxpayer received $51.87 in the sale of fruit; $50 from the rental of pasture; and two other small items. From the sale of 4.75 acres of the hill lands it realized a profit of $1,890 and in the sale of reserved oil rights it received $1,180. Its total income was $3,270.66, and its expenses and taxes were $2,897.34. On March 16, 1938, taxpayer made a twenty-year lease of oil rights for royalties which are being paid. On August 26, 1938, it made a lease of oil rights for $20,000 and royalties from oil as long as produced.

Taxpayer received income from its leases in 1938, 1939 and 1940, and declared dividends in each of those years.

On August 26, 1938, taxpayer employed Robert V. New to promote and negotiate oil leases. His compensation was to be based on the amount of rental. Through New's efforts, taxpayer made a lease of oil rights on November 25, 1938, for a minimum period of twenty years, receiving $76,130 and the right to a royalty. Pursuant to the employment agreement, taxpayer paid New $33,306.88 for negotiating this lease and paid an attorney $250 for preparing the instrument.

Thus it will be seen that taxpayer succeeded in selling for profit most of its lands (its main purpose and business) during the first few years of its existence and remained comparatively, in fact almost completely, inactive for several years. However, it was not dissolved, and when the opportunity came, as it did in one instance, it made a sale of a substantial portion of its remaining land holdings at a profit. When the prospect brightened for the

development of oil upon its properties and through reserved oil rights, petitioner's attention to the profit motive became active. This oil prospect revival prevailed within the tax paying period here involved, and taxpayer took advantage of it.

The proper application of the phrase "carrying on or doing business" as it is used in tax statutes was fully considered in Flint v. Stone-Tracy Co., 220 U.S. 107 and therein the Supreme Court approved the statement found in other judicial opinions that the word "business" as it is used in the phrase under examination includes "that which occupies the time, attention and labor of men for the purpose of a livelihood or profit." In Von Baumbach v. Sargent Land Co., 242 U.S. 503 at pp. 514, et seq., the Supreme Court again approved this statement, proceeded to trace the Supreme Court's course in the matter down to the time of decision in the cited case, and concluded that "The fair test to be derived from a consideration of all of them [referring to the cited cases] is between a corporation which has reduced its activities to the owning and holding of property and the distribution of its avails and doing only the acts necessary to continue that status, and one which is still active and is maintaining its organization for the purpose of continued efforts in the pursuit of profit and gain and such activities as are essential to those purposes."

Thus the rule is clear, but as is indicated in the judicial history of the subject, there appears sometimes a twilight zone of fact wherein the objective does not appear in definite outline. With this in mind the Second Circuit in Argonaut Consolidated Mining Co. v. Anderson, 52 Fed.(2d) 55, said, "That there is a degree of quietude which will exempt" a corporation from paying the tax "is indeed well settled." It is then stated in the opinion that in most of the cases therein cited wherein the corporation has not been required to pay the tax the corporation's activities "have been confined to holding the title of property, whose usufruct it receives and distributes in dividends."

This court has adhered to these guiding principles in Porter v. Commissioner, 130 Fed.(2d) 276. Commissioner v. Boeing, 106 Fed.(2d) 305, and United States v. Metcalf, 131 Fed.(2d) 677.

The facts of the instant case conclusively support the Board's holding that the petitioner was carrying on and was doing business in the period for which the tax was levied when measured

by either the affirmative rule pronounced in the Von Baumbach case (supra), or by the negative rule pronounced in the Argonaut case (supra) or by both of these rules.

If more were needed the treasury administrative regulations set out and applied in Magruder v. Realty Corporation, 316 U.S. 69, would be important. But we find no *twilight zone,* no *uncertain degree of quietude,* no *nuances of facts* for the tax period with which we are here concerned and therefore find no occasion for calling these regulations to the aid of the judicial process.

Affirmed.

(Endorsed:) Opinion. Filed Apr. 27, 1943. Paul P. O'Brien, Clerk.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO. 4/28/43—100.